Supreme Court, U.S.
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No. 06-503

IN THE

Supreme Court of the United States

CROWN EQUIPMENT CORPORATION
Petitioner,

v.

JEREMIAH "BART" MORRIS
Respondent.

On Petition for Writ Of Certiorari To The West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Thomas J. Cullen, Jr.
Renée N. Sewchand
Goodell, DeVries, Leech & Dann, LLP
One South Street, 20th Floor
Baltimore, Maryland 21202
Telephone: (410)783-4000

Michael J. Farrell
Counsel of Record
Robert L. Hogan
Farrell, Farrell, & Farrell, PLLC
914 Fifth Avenue
P. O. Box 6457
Huntington, WV 25772
Telephone: (304)522-9100

Attorneys for Petitioner, Crown Equipment Corporation

QUESTION PRESENTED

Whether the Supreme Court of Appeals of West Virginia erred when it held that, under the Privileges and Immunities Clause of the U.S. Constitution, Art. IV Sec. 2, West Virginia Code § 56-1-1-(c), a venue-limiting, forum non conveniens statute, which was passed by the legislature to prevent forum shopping and to address the burden of overcrowded courts, could not apply to law suits brought against West Virginia citizens and residents.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Supreme Court of Appeals of West Virginia.

The petitioner here and appellee below is Crown Equipment Corporation.

The respondent here and appellant below is Jeremiah "Bart" Morris.

The appellee below and respondent here is Jefferds Corporation d/b/a Homestead Materials Handling Company.

CORPORATE DISCLOSURE STATEMENT

Crown Equipment Corporation does not have a parent company, and no publicly held company owns ten percent or more of its stock.

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The opinion of the West Virginia Supreme Court of Appeals is reported at 633 S.E.2d 292 (W. Va. 2006), and is reprinted in the Appendix to the Petition ("Pet. App.") at 1A. The opinion of Justice Benjamin, concurring in result only, is reprinted at Pet. App. 26A. The concurring opinion of Justice Albright is reprinted at Pet. App. 35A. The dissenting opinion of Justice Maynard is reprinted at Pet. App. 42A. The opinions of the Circuit Court of Kanawha County, West Virginia are reprinted beginning at Pet. App. 47A.

JURISDICTIONAL STATEMENT

The West Virginia Supreme Court of Appeals, the highest court in West Virginia, issued its opinion on June 29, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

28 U.S.C. § 2403(b) may apply to this action, and Petitioner hereby affirms that the Attorney General of West Virginia has been served with a copy of this Petition pursuant to Supreme Court Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Privileges and Immunities Act of the U.S. Constitution, Art. IV, Sec. 2, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The pertinent part of West Virginia Code 56-1-1(c) states that "a nonresident of the state may not bring an action in a court of this state unless all or a

substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." Section 56-1-1 is reprinted in its entirety at 61A.

STATEMENT OF THE CASE

As the West Virginia Supreme Court of Appeals has recognized,

> the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute . . . this Court has no blanket power to recast the statute to meet its fancy.

Riffle v. Ranson, 464 S.E.2d 763, 768 (W.Va. 1995). The West Virginia high court exceeded its powers when it struck down a section of the West Virginia legislature's venue statute in a results-oriented, activist opinion, which prompted two concurrences (one in result only) and a vehement dissent.

For years, the State of West Virginia had endured the burden of forum-shopping plaintiffs, whose cases had no substantial relationship to West Virginia, but whose abuse of the State's open legal borders exhausted the State's minimal judicial resources, to the detriment of the cases with ties to the State. In response, the legislature undertook the venture of crafting and enacting West Virginia Code § 56-1-1(c), a forum

non conveniens venue-limiting statute. See Riffle v. Ranson, 464 S.E.2d 763 (W.Va. 1995).

Under § 56-1-1(c), nonresidents of West Virginia may bring suit in West Virginia only if they establish that a substantial part of the acts and/or omissions giving rise to the alleged tort took place in West Virginia. Notably, the statute makes no distinction between citizens, requiring that West Virginians residing outside the state also show a substantial nexus between the tortious conduct and the State before they may bring suit there.

The West Virginia Supreme Court of Appeals has stricken the Legislature's venue statute as it applies to suits brought by non-residents against resident defendants. Accordingly, now non-resident plaintiffs will no longer need to establish a nexus between their cause of action and the State in order to bring suit against resident and citizen defendants. Conversely, non-resident plaintiffs still will need to establish a nexus with the State in order to sue non-resident defendants. The effect of this holding is to protect non-resident defendants from forum shopping plaintiffs, while at the same time giving non-residents an incentive to sue resident defendants, as a vehicle for obtaining venue in West Virginia (much like fraudulent joinder of local defendants to keep cases out of federal court). This holding stands the venue statute on its head, in clear contrast to the intent of the West Virginia Legislature, as its effect not only will result in a failure to preserve scarce judicial resources, but will also increase the risk of frivolous suits filed against its citizens and residents.

The West Virginia Legislature, seeking to preserve its judicial resources in a manner which would be most efficient for its residents, while still offering access to its courts if not so provided by the venue in which the alleged offense occurred, enacted a forum non conveniens, venue-limiting statute for certain specific factual situations. The West

Virginia Supreme Court of Appeals, in a results-driven decision which ignored the relevant and requisite constitutional inquiry, used the Privileges and Immunities Clause to stifle the efforts of the Legislature, in an activist move which exceeded its powers under its own laws. This Court is urged to accept this Petition to affirm the role of the court and to re-establish a thoughtful and constitutional venue statute rightfully created by the State's legislature.

A. Factual Background

The following facts are undisputed, as supported by the findings of fact of the West Virginia trial court. (See Pet. App. at 48A.) Respondent's Complaint in the Circuit Court of Kanawha County, West Virginia arises out of a workplace accident at his job in Grottoes, Virginia, while operating a stand-up rider forklift. Blaming the design of the forklift for his injuries, Mr. Morris brought a design defect, products liability action against petitioner Crown Equipment Corporation ("Crown") and Jefferds Corporation ("Jefferds"), the dealer through which respondent's employer purchased the forklift.

Crown is an Ohio corporation with its principal place of business in Ohio. While Jefferds is a West Virginia corporation, its entire handling and servicing of the subject forklift took place at and through its facility in Verona, Virginia. Jefferds has no facilities in Kanawha County, where respondent filed suit.

Respondent is a Virginia resident and citizen. All events leading up to and regarding the forklift accident occurred in Virginia. The subject forklift was sold, delivered, installed, and serviced through Jefferds's facility in Virginia. The subject forklift has never been in the state of West Virginia, and respondent has never alleged otherwise.

Presumably, because the accident occurred in Virginia, all of the witnesses to the accident are located in Virginia,

beyond the subpoena power of West Virginia courts. Crown's employees, the persons most knowledgeable about the design of Crown's forklift, are located outside of West Virginia. In sum, aside from the fact of Jefferds's incorporation, this case has no connection whatsoever with the state of West Virginia. Venue, however, was available in Virginia.

B. Proceedings Below

Respondent Jeremiah "Bart" Morris, a resident of Virginia, filed a multi-count lawsuit in the Circuit Court of Kanawha County, West Virginia seeking compensatory and punitive damages related to personal injuries he allegedly sustained during a May 4, 2002 forklift accident at his place of employment in Grottoes, Virginia. He sued petitioner Crown, the manufacturer of the forklift, and Jefferds, the West Virginia corporation which delivered the forklift to respondent's Virginia employer, through its office in Virginia.

Crown filed a motion to dismiss pursuant to West Virginia Code § 56-1-1(c), which provides in part that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."[1] After conducting a hearing, the trial court granted

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[1] In complete form, Rule 56-1-1(c) states as follows: "Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: *Provided*, that unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any

Crown's motion to dismiss. (Pet. App. at 47A.) It thereafter granted Jefferds's motion to dismiss, on the same grounds. (Pet. App. at 52A.) Respondent's Motion to Reconsider was denied by the Circuit Court. (Pet. App. at 56A.)

The matter traveled directly up to the West Virginia Supreme Court of Appeals, through respondent's petition for appeal. With minimal analysis which ignored the requisite constitutional inquiry under the Privileges and Immunities Clause, Art. IV, Sec. 2, the West Virginia high court struck down § 56-1-1(c) as applied to residents and citizens of West Virginia. See Morris v. Crown Equip. Corp., 633 S.E.2d 292, 300 (W.Va. 2006). (Pet. App. at 1A.)

When examining claims that citizenship or residency classifications offend privileges and immunities protection, courts may reject statutes only if they satisfy two criteria:

> (1) that the statute involves activity which is sufficiently basic to the livelihood of the nation so as to fall within the purview of the Privileges and Immunities Clause; and
> (2) that the challenged restriction deprives nonresidents of a protected privilege which is not closely related to the advancement of a substantial state interest.

Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64-65 (1988) (citations omitted); see also Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (the Privileges and

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legal basis to obtain personal jurisdiction over the defendant." This subsection became effective June 2003.

Immunities clause does not preclude discrimination against nonresidents where there is substantial reason for difference in treatment and discrimination practiced against nonresidents bears substantial relationship to state's objective). The West Virginia high court conducted no such analysis, instead rendering a results-oriented opinion which ignored the plain language of the statute and the substantial state interest upon which the statute was founded.

The majority opinion held that West Virginia Code § 56-1-1(c) "categorically immunize[d]" resident defendants from suits brought by non-resident plaintiffs, and "contravene[d] the constitutionally permissible scope of the venue statutes in an interstate context." Morris, 633 S.E.2d at 300. It was thus held not to apply to "civil actions filed against West Virginia citizens and residents." Id. Notably, the court recognized the distinction between citizens and residents for purposes of this statute.

However, a cursory glance at the language of the statute reveals that no such "categorical" exclusion is set forth. Rather, the statute merely requires that non-residents show that a substantial part of the acts giving rise to their claims occurred in West Virginia. Thus, the preference established by the statute is not categorical over all non-residents, but rather over those non-residents whose accidents took place outside of West Virginia.

Moreover, to find that a statute satisfies constitutional requirements, courts need only be presented with a substantial reason for the dissimilar treatment, which is closely related to a state interest. Piper, 470 U.S. at 284. Thus, even assuming the categorical exclusion of all suits brought by non-residents, had the West Virginia high court applied the requisite constitutional test, it would have found that the preference outlined in the statute was narrowly tailored and closely related to the state's substantial state interest in relieving

overburdened, overcrowded courts and efficiently using its judicial resources for actions with a substantial relationship to the State. West Virginia Code 56-1-1(c) simply allows for the state to effectively target its scarce judicial resources, provided by its citizens, while distinguishing only those persons who can bring actions in other venues - venues which in most scenarios would be more convenient and better equipped to handle an action where the injury occurred.

In a mindful effort to make sure that non-residents still have an opportunity to have their cases heard, even if venue is not proper in West Virginia, the Legislature even incorporated into the statute a safe harbor provision for those non-residents who, based on the relevant laws of the jurisdiction where venue was appropriate, could not file in the states where their causes of action arose. See W.Va. Code 56-1-1(c) (providing venue unless the case is time-barred).

REASONS FOR GRANTING THE PETITION

In rendering its results-oriented opinion, the West Virginia Supreme Court of Appeals ignored long-standing precedent set by this Court, which allowed states to apply principles of forum non conveniens and, more specifically, to do so through preference of its residents for access to its courts over nonresidents. See Section I.A., infra. Indeed, for decades, forum non conveniens and venue-limiting principles, either through statute, common law, or constitutional provision, have been staples of the jurisprudence in most states across the country. See Section I.B., infra.

Crown urges this Court to accept certiorari in this case for two reasons: so that it may re-establish a statute which is wholly consistent with the Court's well-established precedent

regarding venue and forum nonconveniens, as well as with those of numerous states; and so that it may correct the actions of an activist court, which exceeded its powers by striking down the appropriate and rightful efforts of the state legislature to serve a substantial state interest.

I. THE DECISION BELOW CONTRAVENES LONG-STANDING SUPREME COURT PRECEDENT AND PRINCIPLES RECOGNIZED IN NEARLY EVERY STATE IN THE COUNTRY.

A. The Decision of the Lower Court is In Direct Conflict with Well-Established Supreme Court Precedent.

Nearly a century ago this Court established that "[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 387 (1929). It thus upheld a New York statute, which limited venue of non-resident suits to certain specific conditions,[2] as it did not discriminate between citizens. In other words, at least for this specific purpose under the Privileges and Immunities Clause, a distinction between residents and citizens would be recognized, and because the statute placed non-resident citizens of New York in the same position as non-resident non-citizens of New York, it passed constitutional muster. See id. at 386-87.

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[2] The relevant section, in its entirety was a follows. " 'An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: . . . 4. Where a foreign corporation is doing business within this State.'" Douglas, 279 U.S. at 386.

Notably, in its flawed majority opinion, the West Virginia high court recognized this distinction between residents and citizens, holding that the Legislature's venue statute did "not apply to civil actions filed against West Virginia citizens and residents." Morris, 633 S.E.2d at 300 (emphasis added). A contrary interpretation would render redundant the court's decision to identify both categories of persons.

Subsequent to Douglas, this Court reaffirmed that non conveniens, venue-limiting statutes, such as that of West Virginia, do not violate the Privileges and Immunities Clause for preferring residents to non-residents. See Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1 (1950). The facts in Mayfield practically mirror those here, as they involved non-resident plaintiffs who had filed suit in Missouri, despite the fact that the accident giving rise to their negligence claims did not take place there. The highest court in Missouri had determined that the Privileges and Immunities Clause precluded Missouri courts from applying forum non conveniens. Disagreeing, this Court held

> [ ] Missouri cannot allow suits by nonresident Missourians for liability . . . arising out of conduct outside that State and discriminatorily deny access to its court to a non-resident who is a citizen of another State. But if a State chooses to prefer residents in access to often over-crowded courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control.

Id. at 3-4; see Chicago, Rock Island and Pacific Railroad Co. v. Riederer, 454 S.W.2d 36, 37 (Mo. 1970) (quoting this language); Gore v. U.S. Steel Corp., 104 A.2d 670, 675 (N.J.), cert. denied, 348 U.S 861 (1954) ("It is now well recognized that the dismissal of a nonresident's action under principles of Forum non conveniens in nowise violates the privileges and immunities clauses of the federal constitution."). Accordingly, this Court vacated the ruling so that the Missouri high court could "decide the availability of the principle of forum non conveniens . . . according to its local law." Mayfield, 340 U.S. at 5.

Local law in West Virginia required that the Circuit Court in Kanawha County, West Virginia dismiss this case by a nonresident whose action arose outside the State, and that the Supreme Court of Appeals affirm that decision under the Legislature's forum non conveniens statute. Instead, the West Virginia high court ignored the long-standing and directly relevant precedent set forth by this Court in Douglas and Mayfield.

B. The Decision of the Lower Court is in Direct Conflict with the Decisions of Numerous State Courts, Which Have Upheld Similar Applications of Forum Non Conveniens Principles.

Most if not all states have accepted the principle of forum non conveniens and have provided for its application, either through common law reliance on this Court, codification by state legislatures, or constitutional provisions, and some have done so precisely to relieve over-crowded courts and prevent forum shopping. Relying on this Court's precedent, the highest courts of those states consistently have

held that the Privileges and Immunities Clause does not preclude application of this principle to prefer residents of a state over non-residents. And many of these cases have nearly identical fact patterns to that here, where neither the plaintiff nor the act leading to the alleged injury have any ties whatsoever to the state in which the suit was filed.

For example, this Court declined to review a decision of the California Supreme Court which upheld the dismissal of a case brought by a New Mexico resident where the accidents giving rise to the allegations occurred in New Mexico. Price v. Atchison, T. & S. F. RY. Co., 268 P.2d 457 (Cal.), cert. denied, 348 U.S. 839 (1954). Relying on this Court's precedent and confirming the constitutionality of the lower court's application of forum non conveniens, California reaffirmed that it "has no policy, either statutory or court made, of discrimination against [ ] noncitizens of California . . . in determining when a nonresident of th[e] State will be given access to State courts to litigate a cause of action which arose elsewhere . . . . Id. at 460.

Likewise, Oklahoma, Texas, South Carolina, and Ohio, to name a few states, have abided by this Court's precedent in upholding forum non conveniens statutes. As the dissenting opinion in the West Virginia high court recognized, the Oklahoma Supreme Court upheld the forum non conveniens statute passed by its legislature, which allowed its courts to dismiss cases brought by non-residents where the action giving rise to the alleged tort did not occur in that state. Quoting this Court's precedent in Mayfield, the Oklahoma reiterated the principle that determining whether a non-resident would have access to its courts to litigate a claim which did not arise there did not discriminate among citizens. St. Louis –San Francisco Ry. Co. v. Superior Court, Creek County, 276 P.2d 773, 777 (Ok. 1954).

As recent as 1999, Texas's high court relied on Douglas to deem constitutional a state statute which allows its courts to dismiss a claim brought by a non-resident, unless the plaintiff "makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in Texas." Owens Corning v. Carter, 997 S.W.2d 560, 568 (Tex. 1999).

Likewise, South Carolina's venue statute has withstood constitutional scrutiny. See, e.g., Rosenthal v. Unarco Industries, Inc., 297 S.E.2d 638, 641-42 (S.C. 1982) (recognizing the preference for residents over nonresidents, upholding it under an equal protection challenge, and noting that it has "accomplish[ed] several legislative objectives rationally related to the state's interest."). South Carolina's statute regarding corporations is nearly identical to that of West Virginia. It allows actions brought by nonresidents only when it is demonstrated that "the cause of action shall have arisen or the subject of the action shall be situated within this State." S.C. Code 15-5-150 (1976); see also, Rosenthal, 297 S.E.2d at 641-42.

Similarly, Ohio's venue-limiting statute precludes non-residents from bringing suit there unless the injury occurred there. See Loftus v. Pennsylvania R. Co. Lininger, 140 N.E. 94, 95 (Oh. 1923). Relying on analogous cases in which this Court upheld other state statutes challenged under the Privileges and Immunities Clause, the Supreme Court of Ohio found the statute to be in accordance with the Constitution, as it was "based upon residence without regard to citizenship." Id. at 98.

Significantly, the Ohio high court made note of the fact that the plaintiff, a citizen and resident of Pennsylvania who was injured during the course of his employment in Pennsylvania, undoubtedly could have brought suit in

Pennsylvania, and would not have been prejudiced by having his case heard there. Moreover, while

> [w]e are not required to justify the acts of the Legislature, [ ] it might very pertinently be remarked at this point that the courts of our state are maintained at considerable expense, and only a small fraction of such expense is charged to litigants, the major portion being met by taxes and levied upon the property of the state. The constitutional mandate that all courts shall be open does not require that the burdens of taxation in a single state shall be further increased to provide remedies by judicial process for those who for reasons of their own prefer to reside in other states. It may be further remarked that the statute makes ample provisions for the stranger within our gates if injured in person or property while sojourning in, or traveling through, the state.

Id. at 99 (emphasis added). For nearly a century, states have enacted statutes to ease the burden on their courts and their taxpayers by making preferences based on residence. West Virginia is no different, having narrowly tailored a venue statute closely related to the State's substantial interest in protecting its courts and its citizens from the burdens of lawsuits with no relationship to the state. See infra, Section II.

Apart from the states discussed supra, numerous other states have enacted venue-limiting statutes or have otherwise applied the doctrine of forum non conveniens, and those statutes or decisions have withstood challenges under the Privileges and Immunities Clause. See Westerby v. Johns-Manville Corp., 32 Pa. D. & C.3d 163, 166-67 (Pa. Ct. Com.

Pls. 1982) (rejecting the plaintiff's Privileges and Immunities Clause challenge and citing cases from courts in nearly every state for the proposition that the doctrine of forum non conveniens "is now firmly imbedded in the law of virtually all American jurisdictions."). Many of these cases have involved fact patterns similar to that at issue here and remain good law, despite dating back several decades. See, e.g., Plum v. Tampax, Inc., 168 A.2d 315, 316-17 (Pa.) (dismissing a case brought by a nonresident plaintiff wherein the relevant actions did not occur in Pennsylvania), cert. denied, 368 U.S. 826 (1961); Johnson v. Chicago, Burlington and Quincy Railroad Co., 66 N.W.2d 763, 776 (Minn. 1954) (affirming dismissal of case brought by noncitizen and non-resident plaintiff where the relevant acts occurred outside the state); see also Mooney v. Denver & R.G.W.R. Co., 221 P.2d 628, 647 (Utah 1950) (engaging in a lengthy discussion of Supreme Court precedent on the application of forum non conveniens and holding that a court may dismiss a case brought by a non-resident where the action did not arise in that state); Whitney v. Madden, 79 N.E.2d 593, 585-96 (Ill.), cert. denied, 335 U.S. 828 (1948) (recognizing that the "privilege of free access to the courts must be tempered with reasonable limitations," that courts may decline to hear cases when courts are overburdened, and affirming dismissal of a case brought by a non-resident where the action arose outside the state.).

Simply put, the opinion of the West Virginia Supreme Court of Appeals flies in the face of decades of jurisprudence which has appropriately applied concepts of forum non conveniens, and which has allowed states and their courts to advance policies which prefer that their residents obtain access to scarce state resources over persons with no connection whatsoever to their state.

C. Preclusion of Non-Resident Suits Brought Against Resident Corporate Defendants is Permissible Under Forum Non Conveniens Principles.

While many of the cases above affirming the application of forum non conveniens to non-resident suits have addressed fact patterns with non-resident defendants (such as Crown), courts also consistently have affirmed dismissal of cases against resident defendants, and particularly in cases such as the present, in which the only connection to the state is the location of a defendant's incorporation. Under such circumstances, courts have recognized that the interests of justice and the policy underlying forum non conveniens are not satisfied by mandated venue based on residency.

New York's high court explained it well when it overruled prior precedent precluding dismissal of cases if one of the parties was domiciled there. Reversing a lower court decision which retained venue over a case brought by a Hawaii plaintiff against a New York corporation arising out of acts which took place in Hawaii, New York's high court reasoned that the application of forum non conveniens

> should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties. . . Forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine – its flexibility based on the facts and circumstance of a particular case – is severely if not completely undercut when our courts are prevented from

> applying it solely because one of the parties is a New York resident or corporation.

Silver v. Great American Ins. Co., 278 N.E.2d 619, 622 (N.Y. 1972) (emphasis added). The court added that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." Id. at 621 (emphasis added). This opinion, handed down more than thirty years ago, remains good law and clearly has passed constitutional muster.

Courts in Delaware, New Jersey, Pennsylvania, Missouri, and even this Court, share this view, that a forum non conveniens statute applies to cases involving resident and citizen defendants, and that it is permissible to dismiss a case on such grounds when the defendant is a resident and citizen of the state. See Chicago, Rock Island and Pacific Railroad Co. v. Riederer, 454 S.W.2d 36, 39 (Mo. 1970); Gonzales v. Atchison Topeka and Santa Fe Railway Co., 371 P.2d 193, 199 (Kan. 1962) (dismissing case against resident defendant corporation); Gore v. U.S. Steel Corp., 104 A.2d 670, 676-77 (N.J.), cert. denied, 348 U.S 861 (1954) (dismissing a case where the only connection to New Jersey was the defendant's incorporation and recognizing the burden which would be placed on courts extensively litigating foreign cases because plaintiffs perceived an advantage there); see also Winsor v. United Air Lines, Inc., 154 A.2d 561, 564 (Del. Sup. Ct. 1958) (dismissing a case where the only contact was as the state of the defendant's incorporation); Westerby, 32 Pa. D.&C.3d at 178-79 (rejecting argument that forum non conveniens did not apply when defendant corporation was Pennsylvania resident) (citing cases).

This Court has stated that when determining the appropriate forum,

> the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of forum non conveniens, which resists formalization and looks to the realities that make for doing justice.

Koster v. Amer. Lumbermens Mut. Casualty Co., 330 U.S. 518, 528 (1947). Here, while Jefferds is incorporated in West Virginia, its office in Verona, Virginia was responsible for every activity involving the subject forklift in this case. The forklift was sold, delivered, and serviced through their Virginia office, which is undisputed by respondent. The forklift never entered the state of West Virginia. The only connection to West Virginia is the mere fact of Jefferds's corporate domicile. All witnesses to the accident and, more significantly to this design defect case, all witnesses with knowledge regarding the design of the forklift, are located outside the state of West Virginia. "[T]he realities that make for doing justice" and simple common sense instruct that this case is best tried in Virginia. See Koster, supra.

It is plain that the question of venue as applied to this fact pattern has been considered and ruled upon extensively by various courts. The West Virginia Supreme Court of Appeals simply got it wrong this time, and in so doing, it exceeded its powers and squelched the efforts of the West Virginia

legislature to address the very real and serious state concern of overburdened courts and scarce judicial resources.

II. THE STATUTE STRICKEN BY THE WEST VIRGINIA HIGH COURT RAISES AN ISSUE OF CRITICAL IMPORTANCE TO THE EFFORTS OF WEST VIRGINIA TO ADDRESS THE SUBSTANTIAL STATE CONCERN OF OVERBURDENED COURTS, SCARCE JUDICIAL RESOURCES, AND FORUM SHOPPING PLAINTIFFS.

A. Aware of How Matters With No Interest to or Nexus With the State were Crippling West Virginia's Judicial System, the Legislature Enacted a Forum Non Conveniens, Venue Statute to Address this Substantial State Interest.

The West Virginia judicial system serves a small, economically-challenged State. West Virginia's 55 counties are divided into 31 judicial circuits, which are presently served by 65 circuit judges. The various judicial circuits vary in size and composition. Many of the judicial circuits serve only one West Virginia county. Some judicial circuits encompass multiple counties, including two circuits that serve four counties. One judicial circuit is served by seven circuit judges, while 11 circuits are served by a single circuit judge.

Significantly, the circuit courts are West Virginia's only state trial court of record. As such, circuit courts are the all-purpose workhorses of the West Virginia judicial system. Circuit courts have jurisdiction over all civil cases at law in which more than $300.00 is in controversy, as well as all cases in equity; proceedings in habeas corpus, mandamus, quo warranto, prohibition, and certiorari. Circuit courts also have jurisdiction over both felony and misdemeanor criminal matters. In addition, circuit courts hear appeals from magistrate courts, municipal courts, family law courts, and various administrative agencies. The circuit courts also have

responsibilities relating to juvenile and mental hygiene proceedings. The Supreme Court of Appeals of West Virginia has reported that in 2004, 46,890 cases were filed in West Virginia's circuit courts (excluding family court appeals), of which 32,299 were civil case filings.[3]

The Supreme Court of Appeals of West Virginia is the State's court of last resort, and its only true appellate court. In fact, West Virginia is one of only 11 states served by a single appellate court. For years, the Supreme Court of Appeals of West Virginia has claimed – with statistical justification – to be "the busiest appellate court of its type in the United States."[4]

Regrettably, the perception of West Virginia's judicial system by corporate America has been, and remains, poor. The United States Chamber of Commerce has commissioned Harris Interactive, Inc. to conduct yearly surveys of in-house general counsel and other senior litigators at public corporations in an effort to explore how reasonable and fair the tort liability system is perceived to be by corporate America. West Virginia has consistently ranked at or near the bottom in all of those surveys. In the January 11, 2002 Final Report of the U.S. Chamber's "State Liability Systems Ranking Study," West Virginia ranked 49th among the 50 States, only surpassing Mississippi. The survey revealed that West Virginia was perceived to be among the worst jurisdictions for the treatment of (1) tort and contract litigation, (2) class action suits, (3) punitive damages issues, (4) motions for summary judgment or dismissal, (5) discovery issues, and (6) issues relating to scientific and technical evidence. Further, the survey revealed that West Virginia was perceived to be among the worst jurisdictions with respect to

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[3] See http://www.state.wv.us/wvsca/circuits.htm, "Circuit Courts – 2004 Annual Report."

[4] See, e.g., http://www.state.wv.us/wvsca/Supreme.htm.

(7) judicial impartiality, (8) judicial competence, (9) jury predictability and (10) jury fairness.[5] Similar surveys taken after 2002 have yielded similar results.

Whether or not the perception of West Virginia's judicial system by the corporate world is fair or accurate, the West Virginia Legislature has recognized that those perceptions do influence litigators. Consequently, West Virginia has routinely been on the leading edge of mass tort litigation practice during the past decade. Further, the perception in West Virginia has been that creative personal injury and other litigators have and will continue to search for avenues to escape jurisdictions, such as the Commonwealth of Virginia, which are perceived to be more conservative than West Virginia.

West Virginia Code § 56-1-1(c) is the West Virginia Legislature's response to the perception that the State has or will become a magnet for litigation with little or no relationship to the State. The statute reflects the Legislature's desire that West Virginia's scarce judicial resources be devoted to matters of interest to the State and its residents. The case presently before the Court is precisely the type of lawsuit which the statute was intended to prevent from burdening West Virginia's judicial system. In this matter, the Respondent ignored the facts that (a) he is a Virginia resident, (b) he is or was employed in Virginia (c) his accident occurred at his place of employment in Virginia, (d) he was allegedly injured while using a forklift sold and serviced in Virginia, (e) he was treated for his alleged injuries in Virginia, (f) virtually all of the evidence relevant to his cause of action and claim for injuries is situated in Virginia, and (g) for the most part, Virginia law will be applicable to his claim based on the doctrine of *lex loci delicti*. The Respondent's decision to file suit in West Virginia, and not Virginia, is obviously motivated

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[5] See http://www.instituteforlegalreform.com/resources/index.html, "2002 State Liability Systems Ranking Study."

by a single factor: West Virginia has adopted a system of comparative negligence, while Virginia adheres to a stricter doctrine of contributory negligence that, if proven, will bar a recovery by a plaintiff. Cf., e.g., Ponirakis v. Choi, 262 Va. 119, 124, 546 S.E.2d 707, 710-11 (2001). Even though a West Virginia circuit court is bound to apply Virginia law to the Respondent's claim, the Respondent and his counsel no doubt recognize that the Supreme Court of Appeals of West Virginia has held that it will not apply a foreign jurisdiction's contributory negligence doctrine on the grounds that such a doctrine is contrary to West Virginia's public policy. Syl. Pt. 2, Mills v. Quality Supplier Trucking, Inc., 510 S.E.2d 280 (W.Va. 1998).

West Virginia's strong interest in devoting its scarce judicial resources is advanced in a fair and balanced fashion. West Virginia Code § 56-1-1(c) distinguishes between residents and non-residents, not between citizens of separate states. Moreover, to ensure protection of every person's constitutional right of access to courts, the statute allows a non-resident plaintiff to file suit in West Virginia if the non-resident cannot obtain jurisdiction in either federal or state court in the state where the action arose, so long as the claim is not time-barred by a relevant statute of limitations, or otherwise. Thus, the State took every precaution to ensure that its venue statute was tailored to address this substantial concern without denying constitutional rights or treating individuals unfairly.

B. The West Virginia High Court's Holding Turns the Venue Statute on its Head, in Clear Contravention of the Intent of the West Virginia Legislature.

As a result of the ruling from the West Virginia Supreme Court of Appeals, § 56-1-1(c) no longer applies to West Virginia citizens and residents. Accordingly, non-

residents no longer need to establish a nexus with West Virginia in order to sue a resident or citizen of the State. As a result, a statute which the West Virginia Legislature enacted to protect its citizens and its courts from suits which have no basis for litigation in the State, has become a statute which not only encourages such suits, but also provides an incentive to sue its residents – for now, non-resident plaintiffs wanting to make use of a perceived advantage in West Virginia courts will seek out resident West Virginians to sue in order to establish venue there.

Take, for example, a group of potential pharmaceutical litigants from Virginia with a savvy plaintiff's attorney who believes that West Virginia has a more advantageous venue for a piece of mass tort litigation – an opinion which is not novel. See supra, II.A. The pharmaceutical company is not a West Virginia corporation; however, some of the plaintiffs had been treated for their alleged injuries by physicians in West Virginia. Before the West Virginia high court's holding, a showing would be necessary that the acts or omissions giving rise to the action occurred in West Virginia before suit could be brought there. Such was the intent of the Legislature.

Now, these Virginia plaintiffs, who could not otherwise have sued in West Virginia and who would not otherwise have sued their physicians, may do so to take advantage of West Virginia's perceived venue advantages. The effect: a West Virginia court is now burdened with a mass tort involving a non-resident pharmaceutical company and non-resident plaintiffs, and West Virginia physicians who otherwise would never have been sued are now burdened to argue venue is appropriate in West Virginia with a law suit.

There simply is no rationale which would suggest that such a fact pattern is what the Legislature contemplated when it passed its venue statute. It is completely converse to the stated intent of the Legislature to preserve its courts for West Virginians and for nonresidents who are injured in the state. West Virginia courts will continue to be burdened and bogged

down by cases with no connection to the State, and West Virginia citizens, including physicians who must consider malpractice insurance, face the heightened risk of frivolous lawsuits. In effect, the West Virginia Supreme Court of Appeals has turned the venue statute on its head, to hinder West Virginia courts and residents.

One might argue that the Supreme Court of Appeals of West Virginia, as the highest court in the State, is well-situated to assess the utilization of judicial resources. However, as the branch of government which causes the courts to be funded and which is charged with the task of enacting the public policy of West Virginia into law, the West Virginia Legislature's decision to enact a venue-limiting, forum non conveniens statute must be respected. The application of the Privileges and Immunities Clause by West Virginia's high court was in error. This Court should correct that error, and thereby enable the Legislature's policy decision to remain effective.

CONCLUSION

For the reasons set forth herein, this Petition for Writ of Certiorari must be granted.

Respectfully submitted,

MICHAEL J. FARRELL,
COUNSEL OF RECORD
ROBERT L. HOGAN
FARRELL, FARRELL, &
FARRELL, P.L.L.C.
914 Fifth Avenue
P.O. Box 6457
Huntington, WV 25772-6457
Telephone: (304) 522-9100

THOMAS J. CULLEN, JR.
RENÉE N. SEWCHAND
GOODELL, DEVRIES, LEECH
& DANN, LLP
One South Street, 20th Floor
Baltimore, Maryland 21202
Telephone: (410) 783-4000

APPENDIX

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

January 2006 Term

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WEST VIRGINIA

No. 32751

JEREMIAH "BART" MORRIS,
Plaintiff Below, Appellant

v.

CROWN EQUIPMENT CORPORATION,
a foreign corporation; and JEFFERDS CORPORATION,
dba HOMESTEAD MATERIALS HANDLING COMPANY,
a West Virginia Corporation,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Hon. Tod J. Kaufman, Judge
Case No. 04-C-1174

REVERSED AND REMANDED

Submitted: March 29, 2006
Filed: June 29, 2006

John W. Cooper, Esq.
Cooper, Preston & Douglas
Parsons, West Virginia
Thomas W. Pettit, Esq.
Barboursville,
West Virginia
Attorneys for Appellant

Michael J. Farrell, Esq.
Robert L. Hogan, Esq.
Farrell, Farrell & Farrell
Huntington, West Virginia
Attorneys for Crown
Equipment Corp.

Thomas J. Cullen, J.R., Esq.
Adam T. Sampson, Esq.

Godell, DeVries, Leech & Dawn
Baltimore, Maryland
Pro Hac Vice for Crown Equipment Corp.

Lawrence E. Morhous, Esq.
M. Hudson McClanahan, Esq.
Brewster, Morhous, Cameron, Mullin, Caruth & Moore
Bluefield, West Virginia
Attorneys for Jefferds Corporation, dba Homestead Materials Handling Co.

JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. Under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.

3. *W.Va. Code*, 56-1-1(c) [2003] does not require a plaintiff to separately establish venue for each defendant.

Starcher, J.:

In this case we hold that a plaintiff cannot be denied the right to bring a products liability lawsuit in this state against a West Virginia corporation and an out-of-state corporation merely because the plaintiff is a resident of another state.

I.

Facts & Background

The complaint in the instant case alleged the following facts: the appellant and plaintiff below, Jeremiah "Bart" Morris ("Morris"), a resident and citizen of Virginia, suffered a severe leg injury at his place of employment in Virginia while operating a stand-up forklift that was distributed and serviced by the appellee and defendant below, Jefferds Corporation, dba Homestead Materials Handling Company ("Jefferds"), a West Virginia corporation. The forklift was designed, manufactured, and distributed by the appellee and defendant below, Crown Equipment Corporation ("Crown"), an Ohio corporation.[1]

On April 30, 2004, Morris filed a civil action against Jefferds and Crown in the Circuit Court of Kanawha County, West Virginia, alleging various products liability theories of recovery, including negligence, strict liability, failure to warn, and breach of warranty, as well as asserting a claim for punitive damages.

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[1] The complaint further alleged that Jefferds was incorporated under the laws of West Virginia, had its principal place of business in Kanawha County, West Virginia, conducted business in Kanawha County, West Virginia, and was engaged in the business of servicing, maintaining, providing warnings, providing training, testing, inspecting, marketing, distributing, and selling materials handling equipment, including Crown stand-up forklifts. The complaint further alleged that Jefferds provided, serviced, maintained, tested, inspected, marketed, provided with warnings, provided training for, and distributed to Morris' employer the Crown stand-up forklift upon which Morris was injured.

Jefferds and Crown filed motions to dismiss the complaint for improper venue based upon *W. Va. Code,* 56-1-1 [2003], which states:

> (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
>
> (1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;
>
> (2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management;
>
> (3) If it be to recover land or subject it to a debt, where the land or any part may be;
>
> (4) If it be against one or more nonresidents of the state, where any one of them may be found and served with process or may have

estate or debts due him or them;

(5) If it be to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

(6) If it be on behalf of the state in the name of the attorney general or otherwise, where the seat of government is; or

(7) If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit.

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

(c) *Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted*

> *occurred in this state: Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.*
>
> *In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refiling in a court in any other state or jurisdiction.*

(Emphasis added.)

Jefferds and Crown argued in their motions to dismiss that Morris is a nonresident[2] of West Virginia, and

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[2] This opinion will primarily use the term "nonresident" to mean a nonresident or noncitizen of West Virginia; and similarly, the term" resident" will mean resident *or* citizen. It is now established that under the Privileges and Immunities Clause there is ordinarily no difference between discrimination based on a person's "residence" and discrimination based on a person's "citizenship."

> . . . [D]espite some initial uncertainty . . . it is now established that the terms "citizen" and "resident" are "essentially interchangeable," *Austin v. New Hampshire*, 420 U.S. 656, 662, n. 8[, 95 S.Ct. 1191,

that no substantial part of Morris' cause of action arose in West Virginia. Therefore, Jefferds and Crown argued, the provisions of *W. Va. Code*, 56-1-1(c)[2003] required dismissal of Morris' case on improper venue grounds, unless Morris demonstrated by affidavit that he could not bring his case in some other jurisdiction.

Morris argued in reply that the application of *W Va. Code*, 56-1-1(c) [2003] to Morris as a nonresident in the fashion suggested by Jefferds and Crown was unconstitutional under the Privileges and Immunities Clause of the United States *Constitution,* Art. IV, Sec. 2, which states in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[3]

> 1195 n. 8, 43 L.Ed.2d 530 n. 8] (1975), for purposes of analysis of most cases under the Privileges and Immunities Clause.

United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208, 216, 104 S. Ct. 1020, 1026 - 1027, 79 L.Ed. 2d 249, ___ (1984).

> Similarly, while the Court unquestionably has come to treat the terms "citizen" and "resident" in this area as "essentially interchangeable," *Austin v. New Hampshire,* 420 U.S., at 662, n. 8, it has done so not out of a general disregard for the Constitution's language, but rather because the practical relationship between residence and citizenship is close enough that discrimination on the basis of the one criterion effectively amounts to discrimination based on the other.

Id. at 234, 104 S.Ct. at 1036, 79 L. Ed. 2d at 249 (1984). Thus, when weighing the persuasiveness and relevance of decisions in cases that statedly rest their reasoning on the premise that discrimination against individuals on the basis of citizenship is constitutionally suspect – while discrimination on the basis of residence is constitutionally inoffensive – the current irrelevance of that distinction in most cases must be taken into account.

[3] Morris also raised the Open Courts Clause of the *West Virginia Constitution*, Art. III, Sec. 17, which states that:

> The courts of this State shall be open, and *every person*, for an injury done to him, in his person, property, or

Morris argued that the interpretation and application of *W. Va. Code*, 56-1-1(c) [2003] asserted by Jefferds and Crown was constitutionally impermissible because such an interpretation and application would impose a categorical bar upon nonresidents of West Virginia in their access to the West Virginia courts in cases where an otherwise similarly situated resident of West Virginia would not experience such a bar.

Morris further argued that Jefferds' status as a West Virginia corporation established proper venue as to Jefferds, and that because Jefferds served as a venue-giving defendant, Morris could properly join Crown as well.

Finally, Morris argued that the statutory prerequisite for the application of *W. Va. Code*, 56-1-1(c) [2003] – that "all or a substantial part of the acts or omissions giving rise to the claim asserted [did not occur in West Virginia]" – was not established. Morris argued that his Complaint and two subsequent Amended Complaints in fact did set forth allegations establishing that a "substantial part" of the acts or omissions giving rise to his claims did occur in West Virginia.[4]

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reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

(Emphasis added).

In light of our disposition of the instant case, we do not address this constitutional provision.

[4] The Federal venue statute, 28 U.S.C. Sec. 1391, provides that venue lies in any district "in which *a substantial part* of the events or omissions giving rise to the claim occurred . . . " (Emphasis added). "[T]his rule ... is open to the possibility that a claim may have arisen in more than one district . . .," Hodson *v. A. H. Robins Co.*, 528 F. Supp. 809, 814 (E.D. Va. 1981). "[T]he plaintiff is not required to establish that his chosen venue 'has the most substantial contacts to the dispute; rather, it is sufficient that *a* substantial part of the events occurred [here], even if a greater part of the events occurred elsewhere.'" *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 568 (D. Vt. 2004) (emphasis added, *citing Kirkpatrick v. Rays Group*, 71 F. Supp. 2d 204, 212 (S.D.N.Y. 1996)). The Supreme Court of Pennsylvania has stated that determining whether conduct is a substantial factor ". . . simply involves the making of a judgment as to

whether defendant's conduct . . . is so insignificant that no ordinary mind would think of it as a cause for which a defendant should be held responsible." *Ford v. Jeffries*, 379 A. 2d 111, 114 (Pa. 1977) (citing the *Restatement (Second) of Torts* sec. 431, comments a. and b.).

For reasons that do not appear in the record, the circuit court did not grant Morris' timely motions for leave to amend his complaint, and denied Morris' requests for leave to conduct limited discovery to establish further facts that would show that venue was proper in West Virginia. A party may amend a pleading by leave of court, and such leave shall be freely given when justice requires. *W.Va.R.Civ.P.* 15(a); *Brooks v. Isinghood*, 213 W.Va. 675, 684, 584 S. E. 2d 531 (2003).

The circuit court did indicate that it had "considered" the allegations in Morris' amended complaints in ruling on the Jefferds and Crown motions to dismiss.

Morris's Second Amended Complaint stated, in part:

> i. Jefferds inadequately serviced and maintained, failed to provide adequate warnings, failed to provide adequate training, provided warranties, failed to adequately test, failed to adequately inspect, failed to adequately analyze the dangers of, failed to adequately disclose the dangers of, failed to guard against the dangers of, marketed, distributed, installed, and/or sold the forklift at issue at or from its offices in West Virginia;
>
> ii. Jefferds made (or failed to make) management level analyses and decisions from its West Virginia corporate headquarters related to service and maintenance schedules and items; training of service and maintenance personnel; product safety and the dangers associated with the use of the product; operator safety; warnings to be provided and the sufficiency thereof; operator training and instruction and the sufficiency thereof; warranties to be provided; testing, inspection; necessary guarding; product lines to be carried; marketing; distribution; sale; installation; associated contractual arrangements or other agreements; and other items related to stand-up forklifts in general, and the forklift which caused the plaintiffs injury in particular;
>
> iii. Jefferds made the contractual arrangements or other agreements related to the provision and installation of the subject forklift to the Alcoa facility, through its office in West Virginia.
>
> iv. The instructions, manuals, warnings, service records, installation records, warranties, and other

The circuit court accepted Jefferds' and Crown's arguments based on Morris' nonresidency and *W.Va. Code*, 56-1-1(c) [2003]. By orders dated September 1, 2004, and November 24, 2004, the circuit court granted the appellees' motions to dismiss. The circuit court also issued an "Order Denying Plaintiff's Motion to Reconsider" on November 29, 2004. Morris appeals from these orders.

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information about the forklift were provided by Jefferds out of its West Virginia offices;

v. The employees of Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were provided from its office in West Virginia;

vi. The employees of Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were trained at its office in West Virginia;

vii. Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the design of Crown's stand-up forklifts and the associated dangers;

viii. Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the accident history of Crown stand-up forklifts, and to warn its customers and end users thereof;

ix. Jefferds failed, at its office in West Virginia, to adequately analyze the hazards to the operators of the forklifts and guard against the same;

x. Jefferds failed, from its offices in West Virginia, to provide adequate operator training and instruction;

xi. Jefferds marketed, distributed, sold, or otherwise installed the forklift from its offices in West Virginia;

x. Jefferds engaged in other, as yet unidentified, substantial acts or omissions related to the claims being asserted.

Although it is not necessary to decide this issue in light of our resolution of the instant case, it seems clear that the plaintiff's Second Amended Complaint does sufficiently allege that a "substantial" portion of the acts or omissions giving rise to Morris' claims occurred in West Virginia.

II.
Standard of Review

A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. *Kopelman and Associates v. Collins,* 196 W.Va. 489, 492, 473 S. E. 2d 910, 913 (1996). Constitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review. *West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee,* 213 W.Va. 255, 261-262, 580 S. E. 2d 869, 875-876 [2003]. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

III.
Discussion

We begin our discussion by examining the Privileges and Immunities Clause, Art. IV, Sec. 2, of the *United States Constitution.* We then look to what courts have said about access to the courts and the Clause.

A.
Privileges and Immunities

In *Austin v. New Hampshire,* 420 U.S. 656, 662, 95 S.Ct. 1191, 1195, 43 L.Ed. 2d 530, 535-536 (1975), the Court stated:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism.

(Footnote omitted.)

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 380-382, 98 S.Ct. 1852, 1858-1859, 56 L.Ed. 2d 354, 363-364 (1978), the Court quoted from *Paul v. Virginia*, 8 Wall. 168, 180 (1869):

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

and from *Hague v. CIO*, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L. Ed. 1423, 1434 (1939) (Roberts, J. concurring):

> . . . Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of

> that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

(Footnotes omitted.)

B.

Access to the Courts

On the subject of access to the courts in the context of the Privileges and Immunities Clause, Am. Jur. 2d, *Constitutional Law*, Sec. 769 (2006) says:

> Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind. *While a state may decide whether and to what extent its courts will entertain particular causes, any policy the state may choose to adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the latter class it must afford to the same extent to the other, but not to any greater extent.*

(Footnotes omitted, emphasis added.)

In *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233, 54 S.Ct. 690, 691, 78 L. Ed. 1227, 1229 (1934), the Court stated:

> The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to

> citizens of other states substantially the same right of access to its courts as it accords to its own citizens.

(Citation omitted.)

In *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142,148-149,28 S.Ct. 34, 35, 52 L.Ed.143, 146 (1907), the Court stated:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

(Citations omitted.)

* * *

> The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. . . . But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from

> the citizens of other states is void, because in conflict with the supreme law of the land.

In Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562, 40 S.Ct. 402, 404, 64 L.Ed. 713, 716 (1920), the Court stated:

> . . . [t]he constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.[5]

Finally, a leading commentator has said:

> The familiar rhetorical statements of the unqualified duty of a state to open its courts to citizens of other states are no longer to be

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[5] *See also Missouri Pacific Railroad Co. v. Clarendon Boar Oar Co.*, 257 U.S. 533, 535, 42 S.Ct. 210, 211, 66 L. Ed. 354, 356 (1922) ("[The Privileges and Immunities Clause] secures citizens of one State the right to resort to courts of another, equally with citizens of the latter State[.]"); *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698, 704, 62 S.Ct. 827, 830, 86 L. Ed. 1129, 1134, (1942); *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 78, 40 S.Ct. 228, 64 L.Ed. 460, 469 (1920).

> taken literally . . . These statements do, however, express the truth that *the privileges-and-immunities clause requires a state to open the doors of its courts to citizens of other states who assert claims against local residents and citizens, even on causes of action predicated upon the law of another state, if it would allow its own citizens to assert such a cause of action.* . . . [I]t is the duty of the governments to make their citizens and persons residing within their borders respond to their civil obligations; any other rule would be intolerable.

(Emphasis added.) Carrie and Schechter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).[6]

From the foregoing authorities, it may be concluded that there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit.

The appellee Jefferds argues that despite the foregoing authority, *W. Va. Code*, 56-1-1(c) [2003] should be read to set forth a constitutionally valid rule that categorically bars nonresidents from bringing certain lawsuits – even lawsuits against West Virginia residents – when the same lawsuit could be brought by a West Virginia resident.

That is, under Jefferds' proposed reading and application of *W. Va. Code,* 56-1-1(c) [2003], if Mr. Morris and a West Virginia resident had both been injured in the accident in question, the West Virginia resident would encounter no obstacle to filing suit against Jefferds in West Virginia. Only Morris would be so barred, by reason of his

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[6] *See also Gober v. Federal Life Ins. Co.*, 255 Mich. 20, 24, 237 N.W. 32, 33 (1931) (applying the Privileges and Immunities Clause) ("If defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this State on her cause of action.").

residency in Virginia. However, the foregoing-quoted authorities are agreed in stating that Privileges and Immunities Clause counsels against such discrimination against nonresidents and favoritism and protectionism on behalf of residents.

Jefferds argues that this Court is restricted by our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) from narrowing or constraining a broad, literal application of *W.Va. Code*, 56-1-1(c) [2003] that would categorically bar suits by nonresidents in West Virginia courts in instances when the same suit could be brought by a West Virginian – even cases against West Virginia defendants.

Our decision in *Riffle* simply deferred to Legislatively-prescribed principles governing intra-state venue. However, in *Riffle* this Court explicitly disavowed applying its decision to interstate situations. 195 W.Va. at 128, n.11, 464 S.E.2d 763, at 770, n.11. This Court also noted in *Riffle* that none of the parties had raised constitutional challenges to the statutory language at issue in that case. *Id.*, 195 W.Va. at 126 n.6, 464 S. E. 2d at 768 n.6. Accordingly, *Riffle* does not and could not authorize this Court to disregard the Privileges and Immunities Clause of the *United States Constitution,* when that issue is properly brought, as it affects a provision of our venue statutes in an interstate context.

A reading or application *of W.Va. Code*, 56-1-1(c) [2003] that would categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a nonresident would contravene the constitutionally permissible scope of the venue statutes in an interstate context. There is no evidence in the cases cited by the parties or identified in this Court's research showing any trend in favor of such distinctions. Additionally, erecting such barriers would contravene established West Virginia

law, including other provisions of *W.Va. Code*, 56-1-1 [2003].[7]

It is axiomatic that

> . . . wherever an act of the legislature can be so *construed and applied* as to avoid a conflict with the constitution, and give it the

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[7] *W.Va. Code*, 56-1-1(a)(1)[2003] states that venue lies against a domestic corporation doing business in this State wherein its principal office is located, or where its president or principal officer resides. We recognized in *Wetzel County Savings and Loan v. Stern Bros., Inc.*, 156 W.Va., 693, 699, 195 S.E. 2d 732, 737 (1973), that the principal place of business of the defendant corporation was an appropriate venue for a lawsuit. In the Syllabus of *State ex rel. Huffman v. Stephens*, 206 W.Va. 501, 526 S.E.2d 23 (1999), we stated:

> Whether a corporation is subject to venue in a given county in this State under the phrase in W. Va.Code, 56-1-1(b), "wherein it does business" depends upon the sufficiency of the corporation's minimum contacts in such county that demonstrate it is doing business . . ..

See Syllabus, *Brent v. Board of Trustees of Davis and Elkins College*, 163 W.Va. 390, 256 S.E.2d 432 (1979):

> If a corporation has made a contract to be performed in whole or in part by any party thereto in a county, has committed a tort in whole or in part in that county, or has manufactured, sold, offered for sale or supplied any product in a defective condition and such product has caused injury to any person or property within that county, it is doing business there and the county's courts have venue to try suits against it which arise from or grow out of such contract, tort or manufacture, sale, offer for sale or supply of such defective product.

See also McGuire v. Fitzsimmons, 197 W.Va. 132, 136, 475 S.E. 2d 132,136 (1996):

> The plain language of W. Va.Code, 56-1-1(a)(1) [1986] does not limit the venue to one county but provides at least two possible justifications for proper venue: either the residence of the defendants or where the "cause of action arose."

> force of law, such construction will be adopted by the court.

(Emphasis added.)

Peel Splint Coal Co. v. State, 15 S.E. 1000, 1004 (1892). A narrow-breadth reading of a statute to assure that its application is constitutionally proper is appropriate as a less-intrusive remedy, *cf. Weaver v. Shaffer*, 170 W.Va. 107, 111, 290 S.E.2d 244, 248 (1980).

We therefore hold that under the Privileges and Immunities Clause of the *United States Constitution,* Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.

Applying the foregoing principles to the facts of the instant case, we conclude that the circuit court impermissibly applied *W.Va. Code*, 56-1-1(c) [2003] to treat Mr. Morris' nonresidency as a categorical bar to his bringing a suit in West Virginia against Jefferds. Moreover, Jefferds is a West Virginia corporation, and the provisions of *W.Va. Code,* 56-1-1(c) [2003] do not apply to Morris' suit against Jefferds.

Therefore, the circuit court's dismissal of Morris' suit against Jefferds must be reversed.

C.

Venue-Giving Defendant

We turn our discussion to the circuit court's dismissal of Morris' case against Crown, the manufacturer of the product that Morris says caused his injury. Crown is not a West Virginia corporation, but it is the manufacturer of a product that was sold and distributed by a West Virginia corporation.

It must first be recognized that Morris' suit against Crown is essentially a products liability case. Products liability suits typically allege that a manufacturer designed and/or produced a product and put the product into the

stream of commerce, and that the product was unsafe or flawed in such a way so as to give rise to the liability of the manufacturer for injuries resulting from the use of the product. The alleged unsafeness or flaw(s) may be as a result of the actual design or construction of the product, or in the adequacy of warnings provided to the user(s) of the product. *See generally Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) and its progeny.

Products liability cases are a feature of every state's law, and manufacturers who put their products into the stream of interstate commerce expect that they may be called to account in court for the safety of the design and manufacture of their products in other states – even though no "culpable" conduct by the manufacturer relating to the design or manufacture of the product occurred in the jurisdiction in which the claim against the manufacturer is brought. This fundamental principle of products liability law underlies our analysis.

A second fundamental principle that must be recognized is that:

> This Court follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process.

Syllabus Point 1, *Staats v. Co-Operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943); *McConaughey v. Bennett's Executors*, 50 W.Va. 172, 179, 40 S.E. 540, 541 (1901). *See also State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 231, 366 S.E.2d 738, 739-40 (1988); *McGuire v. Fitzsimmons*, 197 W.Va. 132, 137, 475 S.E.2d 132, 137 (1996); *Union Carbide & Carbon Corp. v. Linville*, 142 W.Va. 160, 164-165, 95 S.E. 2d 54, 57 (1956); *Webber v. Offhaus*, 135 W.Va. 138, 146-147, 62 S.E. 2d 690, 696 (1950); *McConaughey & Co. v. Bennett*, 50 W.Va. 172, 179, 40 S.E. 540, 542-543 (1901). The principle of the venue-

giving defendant has been an established feature of our law for more than one hundred years, and it is closely intertwined with our procedural rules on joinder.[8]

Complementing and reflecting the longstanding venue-giving defendant principle in our case law and our procedural rules, the provisions of *W.Va. Code*, 56-1-1 [2003] state that venue for "*any* civil action" or "*the* cause of action" is appropriate "wherein *any* of the defendants may reside . . ." and "where *one or more* of the defendants resides." *W Va. Code*, 56-1-1(a) and (b) [2003] (emphasis added).

Crown argues that despite the fact that products liability cases are commonly brought against manufacturers in jurisdictions other than where the product was designed or built, and despite West Virginia's settled venue-giving defendant principle, because Morris is a nonresident of West Virginia, Morris must show *separate acts by Crown that occurred in West Virginia* (*i.e.*, Morris must separately "establish venue" for Crown) before Morris can join Crown as a defendant along with Jefferds in Morris' suit in West Virginia.

In support of this argument, Crown points to language in *W. Va. Code*, 56-1-1(c)[2003] which would bar suit by a nonresident in West Virginia ". . . unless all or a substantial part of the acts or omissions giving rise to *the claim* asserted occurred in this state." Crown notes that *W.Va. Code*, 56-1-1(a)

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[8] The mandatory joinder rule of *W.Va.R.Civ.P.*, Rule 19(a) requires a plaintiff to join in one action all persons who are subject to service of process and in whose absence complete relief cannot be accorded among those already parties. Similarly, the permissive joinder rule of *W.Va.R.Civ.P.*, Rule 20, permits a plaintiff to join as defendants all persons whose liability arises "out of the same transaction, occurrence, or series of occurrences and if any question of law or fact common to all defendants will arise in the action." The goal of both mandatory and permissive joinder is the promotion of judicial economy by preventing both the duplication of effort and the uncertainty embodied in piecemeal litigation.

and (b) [2003] use the terms "cause of action" or "civil action" when saying that a case may be brought wherever one of the defendants is located, see discussion *supra* – while *W. Va. Code*, 56-1-1(c)[2003] uses the term "claim." Crown argues that Morris therefore must separately establish venue for his "claim" against Crown, by showing culpable "acts or omissions" by Crown that occurred in West Virginia.

A rule in accord with Crown's argument would run counter to established principles of joinder and judicial economy. Modern economies operate in complex, multi-jurisdictional networks of designers, manufacturers, distributors, retailers, purchasers, and users. When reasonably possible, legal claims involving these sorts of parties that arise from particular incidents and injuries involving a product should be resolved in a unitary forum.

As this Court recently stated in *Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 21, 614 S.E.2d 15, 21 (2005), quoting *Board of Ed. v. Zando, et. al.*, 182 W.Va. 597, 603-604, 390 S.E. 2d 796, 802-803:

> [t]he fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice–to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts.

In the instant case, where a substantial part of the culpable acts or omissions of one joint tortfeasor (Jefferds) are alleged to have occurred in West Virginia, and where the culpable acts or omissions of a second joint tortfeasor (Crown) are alleged to have occurred outside West Virginia, a requirement that the plaintiff independently "establish venue" with respect to the out-of-state tortfeasor would effectively

prevent joinder of the out-of-state tortfeasor. This would be an absurd result, contrary to all established procedure.

Additionally, Crown's assertion that the statute's use of the word "claim" supports Crown's argument is not well-founded. *Black's Law Dictionary, Centennial Edition,* 6th Ed. 1990, defines the term "claim," *inter alia*, as "[a] cause of action." In *Barker v. Traders Bank*, 152 W.Va. 774, 780, 166 S.E.2d 331, 335 (1969), this Court stated that "Rule 8(a), R.C.P., contemplates a succinct *complaint* containing a plain statement of *the* nature of *the claim* together with a demand for judgment." (Emphasis added). *Cf. Sticklen v. Kittle*, 168 W.Va. 147, 162, 287 S.E.2d 148, 156 (1981) (equating "claim" and "complaint")

There is certainly a sufficient overlap and identity between the ordinary meaning of the terms "claim," "civil action," and "cause of action," as they are used in *W. Va. Code*, 56-1-1 [2003] so as to weigh against finding that the use of the word "claim" in *W. Va. Code*, 56-1-1(c)[2003] establishes a novel rule that would fragment cases, foster piecemeal litigation, and radically alter settled procedures.

Additionally, Crown's suggestion that such a rule should be applied only to nonresidents runs headlong into the foregoing-discussed constitutional principles that strongly disfavor discrimination on the basis of residency in access to the courts. Application of these principles further weighs against such a reading of the statutory language.

For these reasons, this Court will not derive such an intent from the statute's use of the word "claim," nor enforce such a rule. Following our settled law, we hold that *W. Va. Code*, 56-1-1(c) [2003] does not require a nonresident plaintiff to separately establish venue for each defendant.

Based on this holding, the circuit court's dismissal of Crown as a defendant must be reversed.

IV.
Conclusion

The circuit court's dismissal of the plaintiff's claims against the appellants is reversed and this case is remanded.

Reversed and Remanded.

Maynard, Justice, dissenting:

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I would have affirmed the circuit court's dismissal of the appellant's lawsuit because I do not believe that a construction of W.Va. Code § 56-1-1(c) that prevents the appellant from bringing his action in Kanawha County violates the Privileges and Immunities Clause.

In *Douglas v. New Haven R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929), the Supreme Court considered the constitutionality of a New York statute that provided:

> An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; . . . . 4. Where a foreign corporation is doing business within this State.

279 U.S. at 386, 49 S.Ct. 355. The plaintiff's injuries in *Douglas* were inflicted in Connecticut where the plaintiff was a citizen and resident, and the defendant was a Connecticut corporation which did business in New York. The plaintiff brought her suit in New York, and the trial court dismissed it under the above statute. The New York appellate courts upheld the dismissal.

On appeal to the Supreme Court, the plaintiff argued that the statute as construed by the trial court "makes a discrimination between citizens of New York and citizens of other States, because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York." 279 U.S. at 386, 49

S.Ct. at 356. The Supreme Court rejected this argument and affirmed the dismissal. The Court explained:

> It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States can not unless they are actually living in the State. But however often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship, there is nothing to prohibit the legislature from using "resident" in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality we presume that the Courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words.
>
> * * * *
>
> Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between nonresidents with regard to these foreign causes of action. . . . There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

279 U.S. at 386-387, 49 S.Ct. at 356 (citations omitted); *see also State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4, 71 S.Ct. 1, 2-3, 95 L.Ed. 3 (1950) (indicating that "if a State chooses to prefer residents in access to often overcrowded Courts and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control").

Douglas was relied upon by the Oklahoma Supreme Court in the case of *St. Louis-San Francisco Ry. Co. v. Superior Court*, 276 P.2d 773 (1954). In that case, the Court was presented with the issue "whether a . . . court of this state can, because of inconvenience to court and parties, dismiss an action brought by a non-resident plaintiff against a foreign corporation on a cause of action arising outside this state." 276 P.2d at 775. In answering this question in the affirmative, the Court, citing *Douglas,* explained:

> [A] state may not, by reason of the privileges and immunities clauses of the federal Constitution, allow suits in its courts by its own non-resident citizens for liability arising out of conduct outside that state and discriminatorily deny access to its courts to a non-resident who is a citizen of another state. But if a state chooses to prefer residents in access to often over-crowded courts to deny such access to all non-residents, whether its own citizens or those of other states, it is a choice within its own control.

276 P.2d at 777.[1]

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[1] The majority indicates in footnote 2 of its opinion that there is no distinction for purposes of the Privileges and Immunities Clause between discrimination on the basis of residency and discrimination on the basis of citizenship. It should be noted that my construction of the statute at issue makes no such distinction. Rather, it treats all nonresidents, both

I would construe W.Va. Code § 56-1-1(c) to apply to all nonresidents, both citizens and noncitizens of West Virginia. In other words, this statute would also prevent a West Virginia citizen who is residing in Ohio for the purpose of employment and who is injured in Ohio by machinery manufactured by a West Virginia company from suing that company in West Virginia. Such a construction, according to the law set forth above, would not offend the Privileges and Immunities Clause.

W.Va. Code 56-1-1(c) serves an important purpose. Specifically, it is designed to give the residents of this State, who after all pay for our courts, ready access to them when needed. This can be effectively achieved only by preventing nonresidents from abusing our courts by flooding them with litigation, not because they do not have a forum elsewhere, but simply because they believe they may achieve a better result here. For example, in the case of *Grimmett v. CSX Transportation, Inc.*, which was recently referred to the Mass Litigation Panel, approximately 71 out of 79 plaintiffs are nonresidents of West Virginia. In fact, these plaintiffs were involved in actions that were originally filed in Gwinnett County, Georgia. These nonresident plaintiffs who may have very legitimate claims are nevertheless expending the time and limited resources of our State court system, to the detriment of resident plaintiffs, when their claims could have been brought elsewhere. Unfortunately, the majority opinion eviscerates a statutory safeguard against this type of abuse.

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citizens and noncitizens, the same for the purpose of applying W.Va. Code § 56-1-1(c).

Accordingly, for the reasons stated above, I dissent.[2]

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[2] South Carolina has a similar provision in its venue statute concerning foreign corporations as defendants. According to S.C. Code Ann. § 15-5-150 (1976),

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court; . . . (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

Benjamin, Justice,
concurring in result only:

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I agree with the majority's decision to reverse the trial court's dismissal of this matter and remand the case for further proceedings. I do so, however, not upon the constitutional analysis invoked by the majority, but upon far simpler grounds. In my opinion, the plain terms of W. Va. Code § 56-1-1(c) (2003), require reversal of the trial court's dismissal of this action and a remand to resolve the factual question of whether "all or a substantial part of the acts or omissions giving rise to the claim occurred in this state" based upon the allegations contained in the amended complaint and upon Jefferds Corporation's ["Jefferd"'s] status as a West Virginia corporation.[1] If a factual basis is confirmed for Morris' allegations regarding Jefferds' West Virginia operations and acts related to his claim, venue is proper in West Virginia pursuant to W. Va. Code § 56-1-1(c) (2003). Thus, resolution of this matter does not now necessitate addressing the constitutionality of West Virginia's venue statute.

This Court has repeatedly stated that it will avoid invalidating a statute on constitutional grounds where reasonably possible. In 1965, this Court held that:

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[1] As referenced in n. 4, *supra*, of the majority's opinion, it is not readily apparent from the record why Morris' motion to amend his pleadings was denied. Rule 15(a) of Rules of Civil Procedure provides that leave to amend shall be freely given when justice requires. However, trial courts should also insure that parties not abuse our Rules with fraudulent or deliberately exaggerated pleadings. In such cases, it is expected that trial courts will use the full panoply of sanctions available, beginning with Rule 11 of the West Virginia Rules of Civil Procedure.

> [i]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *State ex rel Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); *see also,* Syl. Pt. 2, *State ex rel Riley v. Rudloff*, 212 W. Va. 767, 575 S.E.2d 377 (2002) (quoting *Gainer).* Indeed, "[t]he well settled general rule is that in cases of doubt the intent of the Legislature not to exceed its constitutional powers is to be presumed and the courts are required to favor the construction which would consider a statute to be a general law." Syl. Pt. 8, *State ex rel Heck's Inc. v. Gates,* 149 W. Va. 421, 141 S.E.2d 369 (1965). More recently, this Court summarized its duty in addressing the constitutionality of statutes by stating:

> Only when it can be said beyond a reasonable doubt that a law violates the Constitution of this State will we invalidate a legislative enactment on constitutional grounds. Thus, [w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to

> sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. In this regard, [c]ourts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.

Carvey v. State Bd. of Educ., 206 W. Va. 720, 727, 527 S.E.2d 831, 838 (1999) (internal quotations and citations omitted). This mandated exercise of judicial restraint in addressing a challenge to the constitutionality of legislation should have, in my opinion, resulted in the majority resolving this matter through application of plain statutory language. Morris' appeal of the dismissal of his lawsuit may properly be resolved by applying the plain language of W. Va. Code § 56-1-1, without addressing the constitutionality of W. Va. Code § 56-1-1(c).

Morris brought his product liability suit against Crown Equipment, an Ohio corporation and the manufacturer of the forklift at issue, and Jefferds, a *West Virginia* corporation and the forklift's distributor/seller and maintenance service provider. Pursuant to our venue statute, a civil action may be brought against a West Virginia corporation in any county where its principle office is located or where its president or chief officer resides. W. Va. Code § 56-1-1 (a)(2).[2] Morris

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[2] W.Va. Code § 56-1-1(a)(2) provides:

> Any civil action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the circuit court of any county:
>
> . . .

alleged in his complaint that Jefferds' principle office was located in Kanawha County, the county in which he filed his lawsuit. Jefferds denies in its brief before this Court that its principle office is located in Kanawha County. However, in its order of November 24, 2004, the circuit court found that Jefferds' "officers" live in Kanawha County. Without resolving the conflict regarding the location of Jefferds' principle office in Kanawha County, the trial court's finding regarding Jefferds' officers' residence demonstrates venue was properly established in Kanawha County, as to Jefferds, pursuant to W. Va. Code § 56-1-1 (a) (2).

The circuit court, however, dismissed Morris's suit due to the 2003 enactment of W. Va. Code § 56-1-1(c), which provides, in relevant part, that "a nonresident of the state may not bring an action in a court of this state unless all or a

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> If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management[.]

Under this statutory provision, venue is proper in any county where a corporate defendant's principle place of business is located. Where a West Virginia corporation has its principle place of business in another state, our venue statute then imposes a secondary requirement that the cause of action arose in this state for the establishment of proper venue. As Jefferds is a West Virginia corporation with its principle place of business in West Virginia, Morris was not, under this statutory provision, also required to demonstrate that his cause of action against Jefferds arose in West Virginia.

substantial part of the acts or omissions giving rise to the claim asserted occurred in this state[.]" Finding Morris was a resident of Virginia and the forklift accident at issue occurred in Virginia, the circuit court found that Kanawha County, West Virginia, was an improper venue for Morris' claims against Jefferds. The circuit court's order reflected that it considered the allegations against Jefferds contained in Morris' proposed amended complaint, although the circuit court did not permit the amendment of Morris' complaint.

In the proposed amended complaint, Morris set forth numerous allegations of conduct occurring in West Virginia giving rise to his claims against Jefferds.[3] If true, these allegations may indeed satisfy W. Va. Code § 56-1-1(c)'s requirement that "all or a substantial part" of the acts underlying Morris' claims against Jefferds occurred in West Virginia. In my opinion, the circuit court prematurely dismissed Morris' claims. Morris should have been given the opportunity to conduct limited discovery on the venue issue. If discovery revealed that "all or a substantial part" of Jefferds' acts or omissions occurred in West Virginia, as alleged, venue is proper in Kanawha County, Therefore, I would reverse and remand this matter for the purpose of conducting limited discovery to resolve the crucial factual dispute as to whether the requirements of W. Va. Code § 56-1-1(c) are met in this matter. Fundamental fairness requires more than a resident defendant's mere denial of a non-resident's allegation of proper venue and the factual allegations supporting such venue before access to our courts is denied under W. Va. Code § 56-1-1(c). If Morris were able, upon remand, to properly establish venue as to Jefferds, a West Virginia corporation, in Kanawha County, he likewise establishes proper venue for his entire lawsuit.[4] The majority, however, has relieved Morris of

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[3] *See, supra,* n.4, majority opinion.

[4] As noted by the majority, West Virginia follows the venue-giving defendant principle which provides that once venue is established for one defendant, it is proper for all defendants. While W. Va. Code §56-1-1(c)

this obligation by simply invalidating W. Va. Code § 56-1-1(c).

As noted above, I do not believe that the proper resolution of this appeal requires this Court to address the constitutionality of W. Va. Code § 56-1-1(c). However, because the majority hinges its opinion in this case on the constitutionality of this non-resident venue statute, some observations regarding this statute are appropriate in light of Article IV, Section 2 of the Constitution of the United States, the Privileges and Immunities Clause.[5]

Contrary to the majority's suggestion, the Privileges and Immunities Clause does not categorically bar distinctions based upon residency for venue purposes. In *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), Justice Frankfurter recognized that under:

> the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, s 2. Therefore Missouri cannot allow suits by nonresident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who is a citizen of another State. *But if a State chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access*

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requires that each plaintiff independently establish proper venue, it is silent as to independent defendants, a point recognized in the majority opinion at Syllabus Point 3, *supra.* Since the Legislature has not addressed the issue of individual defendant venue, that issue is not now before this Court.

[5] The Privileges and Immunities Clause provides, in pertinent part, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

> *to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control.*

(Emphasis added.) In *Mayfield*, Justice Frankfurter relied upon Justice Holmes's similar opinion in *Douglas v. New Haven Ry. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929), for the proposition that a state may preclude non-residents from filing claims in state courts without violating the Privileges and Immunities Clause in certain circumstances. In *Douglas*, Justice Holmes, writing for the Court, noted:

> A distinction of privileges according to residence may be based upon rational considerations[.]...There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

Douglas, 279 U.S. at 387.[6]

In both *Mayfield* and *Douglas*, the United States Supreme Court recognized that the need to address an overcrowded court system may be a legitimate, rational basis for discriminating between residents' and non-residents' access to a state court. So long as the West Virginia Legislature provides such a rational basis for discriminating between residents and non-residents when enacting, or revising, a venue statute which prohibits certain suits from being filed in this State by non-

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[6] In *Douglas*, the Court upheld the constitutionality of a New York statute which provided that "[a]n action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; ... 4. Where a foreign corporation is doing business within this State." *Id.* at 386. In so doing, the Court rejected an argument that the statute violated the Privileges and Immunities clause by discriminating between citizens of New York and other states by authorizing the dismissal of suits filed by non-citizens of New York but not of those filed by New York citizens.

residents, it arguably should withstand constitutional scrutiny under the Privileges and Immunities Clause.

Overcrowding of West Virginia courts caused by numerous suits filed by nonresidents against foreign corporations has long been a perceived problem in this State. The Legislature's enactment of W. Va Code § 56-1-1(c) in 2003 was perhaps an effort to address this problem. However, because the Legislature failed to articulate a proper rational basis for discriminating between residents and non-residents for purposes of establishing venue in our courts, this Court cannot now, recognizing the limitations of our Constitutional charge, speculate as to the Legislature's intentions. Without such a proper rational basis for enacting a seemingly discriminatory venue statute, a court left to speculate as to both proper and improper rationales for residency discrimination cannot rightly guess in favor of one possible rationale any more than it can in favor of another.[7]

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[7] The Legislature might consider setting forth its findings relating to the need for a discriminatory venue section, such as W. Va. Code §56-1-1(c), should it choose to further consider such a venue section in the future.

Albright, J., concurring:

FILED
July 12, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF
APPEALS OF
WEST VIRGINIA

I concur with the reasoning and conclusions in this Court's majority opinion in the instant case. I write separately to amplify several of the points made in that opinion.

A.

The venue provisions of *W.Va. Code*, 56-1-1(c)[2003] that are at issue in the instant case address the ability of a court that has jurisdiction over the person(s) and subject matter of a case to nevertheless abstain from the exercise of that jurisdiction, on venue grounds, when another court is available and more appropriate. The doctrine that permits such an abstention – which can apply in both intrastate and interstate contexts – is known as *forum non conveniens*.[1]

In the interstate application of the *forum non conveniens* doctrine, "the state announcing such a policy disclaims any interest in providing a forum for litigation within the scope of the policy, *i. e.*, litigation between foreigners on causes of action predicated on the laws of another state." Carrie and Schechter, "Unconstitutional

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[1] In their briefs, the parties to the instant case agree that *W.Va. Code*, 56-1-1(c) [2003] addresses *forum non conveniens* principles and procedures in an interstate context, just as earlier parts of the statute address these principles and procedures in an intrastate context. *See State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995). In Syllabus Point 1 of *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.* 194 W.Va. 203, 460 S.E. 2d 18 (1954) we stated:

> The common law doctrine of forum non conveniens is simply that a court may, in its sound discretion, decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute.

Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).

A number of courts and commentators have discussed the effect of the Privileges and Immunities Clause of the *United States Constitution* on the exercise of the doctrine of *forum non conveniens:*

> . . . [w]e perceive no reason why the doctrine [*forum non conveniens*] should not be available in this State, upon a proper showing and *without discrimination against either noncitizens of California* or against FELA cases.

Price v. Atchison, T. & S. F. Ry. Co., 42 Cal.2d 577, 581, 583, 268 P.2d 457, 460 (1954) (emphasis added).

> . . . [t]he application of the doctrine [*forum non conveniens*] so as to refuse jurisdiction in an action brought by a citizen of another state will not violate Article 4 *if jurisdiction would also have been refused had the plaintiff been a citizen of the forum state.*

Zurick v. Inman, 221 Tenn. 393, 399, 426 S.W.2d 767, 770 (1968) (emphasis added).

> . . . [M]any courts have followed the general rule that applying the doctrine of forum non conveniens to refuse jurisdiction in an action brought by a citizen of a foreign state does not violate the Privileges and Immunities Clause if jurisdiction would be refused in an action brought by a citizen of the forum state in the same circumstances. A particular state may apply the doctrine of *forum non conveniens, as*

> *long as it is applied to citizens and noncitizens alike.*

Owens Corning v. Carter, 997 S.W.2d 560, 569 (Tex. 1999) (footnote omitted) (emphasis added).

> However, the doctrine [of *forum non conveniens*], as we construe it, is *non-discriminatory* and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens.

Gore v. U S. Steel Corp., 15 NJ. 301, 311, 104 A.2d 670, 675-676 (1954) (emphasis added).

> A state that restricts forum non conveniens to cases involving plaintiffs from other states may run afoul of the Privileges and Immunities Clause of the U.S. Constitution.

Note, "Georgia On the Nonresident Plaintiff's Mind," 36 Ga. L. Rev. 1109, 1142 n.243, (2002).[2]

In *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 234-235, 400 S.E.2d 239, 242-243 (1990), this Court stated:

> A number of other courts have reached the same conclusion that the common law doctrine

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[2] *See also Adkins v. Underwood*, 520 F.2d 890 (7th Cir. 1975) (Illinois Supreme Court did not violate the privileges and immunities clause in view of apparent well-established policy of Illinois courts of allowing nonresident access to Illinois courts and of evenhanded application of *forum non conveniens* doctrine).

> of *forum non conveniens* can be utilized to deny access to courts to nonresident plaintiffs in FELA cases *in appropriate circumstances* without running afoul of the Privileges and Immunities Clause.
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> * * *
>
> . . . no one factor [is] necessarily dispositive in a *forum non conveniens* analysis and ... the doctrine [has] to be applied flexibly on a case-by-case basis [citing *Piper Aircraft v. Reyno,* 454 U.S. 235, 102, S.Ct. 252, 70 L. Ed. 2d 419 (1991).]

(Emphasis added.)[3]

Based on the foregoing authority (and the authority cited in the majority opinion), it appears that in applying a *forum non conveniens* venue statute like *W. Va. Code,* 56-1-1(c) [2002], it is constitutionally permissible to *take into account* the residency or citizenship of the plaintiff, along with other appropriate factors. However, it is constitutionally impermissible to treat nonresidency in or noncitizenship of

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[3] Am. Jur.2d, Constitutional Law, Sec. 769 [2006] states:

> Insofar as such is not prohibited by the Privileges and Immunities Clause, the fact that the parties to an action are noncitizens or nonresidents of the state *may be taken into consideration* by a court in determining whether to apply the doctrine of forum non conveniens, and the application of such doctrine so as to refuse to exercise jurisdiction in an action brought by a citizen of an American sister state is not repugnant to the Privileges and Immunities Clause if, under the particular circumstances, the exercise of jurisdiction would have been refused had the plaintiff been a citizen of the forum state . . . [emphasis added].

"The Supreme Court has permitted nonresidence *to be taken into account* in granting forum non conveniens dismissals[,]" Michael Hoffheimer, "Mississippi Conflicts of Law," 67 Miss. L.J. 175, 321 (1997) (emphasis added).

West Virginia as a *categorical* ground requiring the courts of West Virginia to dismiss a case on the basis of *forum non conveniens,* without regard to other factors that may be relevant. And of course, the *forum non conveniens* principles simply do not apply where the defendant is a West Virginia entity or the cause of action arose in West Virginia.

B.

This Court's opinion in the instant case correctly concludes that our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) cannot and does not diminish this Court's duty to assure that all venue-related statutory language is read and applied in a constitutional fashion.

Notably, the *Riffle* opinion did not mention *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 232, 366 S.E.2d 738, 740 (1988), which states:

> Procedural statutes relating to venue, like West Virginia Code § 56-1-1, are effective only as rules of court and are subject to modification, suspension or annulment by rules of procedure promulgated by this Court. *W. Va. Const.* art. 8, § 3; *W.Va. Code* § 51-1-4 (1981 Replacement Vol.); *W.Va. Code* § 51-1-4a (1981 Replacement Vol.). Ultimately, civil venue questions are governed by the procedural rules promulgated by this Court, the procedural statutes that are not inconsistent with those procedural rules, and the opinions issued by this Court interpreting those procedural rules and statutes. [Footnote omitted].[4]

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[4] *See also Hinchman v. Gillette*, 217 W.Va. 378, 391, 618 S.E.2d 387, 400 (2005) (Davis, J., concurring) (procedural statutes are effective only as rules of court and are subject to modification, suspension, or annulment by rules of procedure promulgated by this Court).

Applying this settled principle, this Court recently held that statutory "provisions ... [were] enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as they address procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution." Syllabus Point 3, in part, *Louk v. Cormier,* 218 W.Va. 81, 622 S.E.2d 788 (2005).

In *Louk*, we stated:

> This Court has made clear that "[t]he legislative, executive, and judicial powers . . . are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the [judicial], legislative or executive department, the lawful exercise of that discretion cannot be controlled by the [others]." *Danielley v. City of Princeton*, 113 W.Va. 252, 255, 167 S.E. 620, 622 (1933). Promulgation of rules governing litigation in the courts of this State rests exclusively with this Court.

Id., 218 W.Va. at ___, 622 S.E.2d at 800.[5]

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[5] *See also* Syllabus Point 1, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) ("Under Article VIII, Section 8 of the Constitution of West Virginia . . . administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); *Williams v. Cummings,* 191 W.Va. 370, 372, 445 S.E.2d 757, 759 (1994) ("This statute . . . is in conflict with and superseded by T.C.R. XVII, which addresses the disqualification and temporary assignment of judges, and thereby dispenses with [the statute] . . .;" *Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey*, 184 W.Va.

Therefore, it is clear that the Separation of Powers Clause, Art. V, Sec. 1 of the *West Virginia Constitution*, authorizes the substantive review and limitation of statutes in the areas of venue and *forum non conveniens* by the supreme court of appeals insofar as the statutes (1) address procedural litigation matters that are regulated exclusively by the supreme court of appeals pursuant to the Rule-Making Clause, Article VIII, Sec. 3 of the West Virginia Constitution; or (2) present other constitutional concerns.

C.

Finally, it should be noted that the result in each of the cases relied upon by the dissenting opinion in the instant case turns and relies on a purported distinction between non-residents and non-citizens, in applying the Privileges and Immunities Clause. The dissent replicates that distinction by finding that the application of *W.Va. Code*, 56-1-1(c) [2002] in the instant case to dismiss Mr. Morris' case is constitutionally permissible, because this West Virginia statute facially applies to both citizen and non-citizen "nonresidents."[6]

As this Court's opinion makes clear at note 2, the notion that there is a substantial and dispositive constitutional distinction between discrimination on the basis of residency and discrimination on the basis of citizenship has been set aside by a series of decisions by the United States Supreme Court. Authority grounded in this obsolete distinction is

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75, 79 n.4, 399 S.E.2d 657 n.4 (1990) ("We note that the procedural statutes relating to venue are effective only as rules of court and subject to modification, suspension, or annulment by rules of procedure promulgated by the Supreme Court.") (citation omitted).

[6] The thoughtful concurrence by Justice Benjamin also cites to *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), a case that turns on a distinction between discrimination against "citizens" of other states and discrimination against "residents" of other states.

therefore fairly unpersuasive; and it seems that any discriminatory scheme, whether against non-residents or non-citizens, is of constitutional dimension and must be measured against a standard higher than a "rational basis." A court's ability to "take into account" the residency of a plaintiff in a true *forum non conveniens* situation, which I believe is permissible, is more respecting of the constitutional values at stake than any categorical discrimination.

Accordingly, I concur with this Court's opinion and judgment.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

CIVIL ACTION NO. 04-C-1174

CROWN EQUIPMENT CORP.,
a foreign corporation and
JEFFERDS CORP. D/B/A HOMESTEAD MATERIALS HANDLING COMPANY,
a West Virginia corporation,

Defendants.

FILED
2004 SEP-1 PM 1:04
CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER

Came this 1st day of September, 2004, Crown Equipment Corp. ("Crown"), by its counsel, Michael J. Farrell and Farrell, Farrell & Farrell, L.C. and came also plaintiff by Thomas W. Pettit and presented oral argument in support of its Motion to Dismiss for Lack of Venue. The Motion was filed pursuant to Rule 12(b)(3), West Virginia Rules of Civil Procedure and West Virginia Code 56-1-1(c).

The Court has considered the argument of counsel at the Hearing on this Motion, the applicable law as well as the allegations in the Complaint, proposed Amended Complaint, and the statements in Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and Crown's Motion for a Protective Order and Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and Crown's Motion for a Protective Order.

Findings of Fact

1. This civil action was filed after June 4, 2003.

2. At all relevant times, plaintiff is and has been a resident of Virginia.

3. The injury which gives rise to this cause of action occurred in Virginia.

4. Crown is an Ohio corporation with its principal place of business in Ohio.

5. Neither the Complaint nor the proposed Amended Complaint allege that Crown engaged in any acts or omissions within the State of West Virginia which gave rise to the claim.

6. None of the acts or omissions alleged by plaintiff against Crown occurred in the state of West Virginia.

7. There are no facts plead in the Complaint and proposed Amended Complaint that Crown is not subject to jurisdiction within the state of Virginia for the alleged acts or omissions which give rise to plaintiff's cause of action.

8. Plaintiff did not file an affidavit with the Complaint or the proposed Amended Complaint that such action cannot be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Crown.

Conclusions of Law

1. West Virginia Code 56-1-1(c) is applicable to all civil actions filed after June 4, 2003.

2. Because this civil action was filed after June 4, 2003, the applicable venue statute is West Virginia Code 56-1-1(c).

3. Plaintiff is a non-resident of the state of West Virginia as contemplated by West Virginia Code 56-1-1(c).

4. Even if the business contacts of a defendant with the state of West Virginia was relevant to a cause of action filed by a non-resident of West Virginia, the principal place of business for Crown is Ohio, not West Virginia.

5. West Virginia Code 56-1-1(c) does consider whether the alleged injurious acts or omissions by a defendant occurred within the state of West Virginia. Significantly, plaintiff makes no allegation that any injurious act or omission by Crown occurred in West Virginia.

6. Because there are no allegations in the Complaint or proposed Amended Complaint that all or a substantial part of the acts or omissions attributed to Crown occurred in the state of West Virginia, there is no venue in the Circuit Court of Kanawha County, West Virginia for this non-resident plaintiff to pursue a cause of action against Crown as contemplated by West Virginia Code 56-1-1(c).

7. Venue in the Circuit Court of Kanawha County, West Virginia must be established against each defendant on the face of the Complaint or the proposed Amended Complaint.

8. Venue in the Circuit Court of Kanawha County, West Virginia is not established as to Crown on the face of the Complaint or the proposed Amended Complaint.

9. Venue for civil litigation in West Virginia is defined by statute.

10. The allegations in the Complaint and proposed Amended Complaint provide no factual or legal basis to disregard the deliberate choice by the West Virginia Legislature to exercise its right to define the venue for the Circuit Courts of this state as set forth in West Virginia Code 56-1-1(c).

11. West Virginia Code 56-1-1(c) expressly provides that dismissal in this circumstance is without prejudice to re-filing in a court in any other state or jurisdiction.

12. The Motion to Dismiss by Crown, based on Rule 12(b)(3), W.Va. R. Civ. Proc. And West Virginia Code 56-1-1(c), is ripe for decision.

13. Both West Virginia Code 56-1-1(c) and Rule 12 (b) (3), W. Va. R. Civ. Proc. Expressly provide that

dismissal is the proper remedy when venue is not proper as to a non-resident plaintiff.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. All claims and causes of action asserted against Crown Equipment Corp. be and are hereby **DISMISSED WITHOUT PREJUDICE** to re-filing in a court in any other state or jurisdiction as provided by West Virginia Code 56-1-1(c).

2. The Clerk of Court shall provide a *teste* copy of this Order to counsel of record as follows:

Thomas W. Pettit, Esquire
Thomas W. Pettit, L.C.
Post Office Box 189
Barboursville, West Virginia 25504

Michael J. Farrell, Esq.
Robert L. Hogan, Esq.
Farrell, Farrell & Farrell
Post Office Box 6457
Huntington, West Virginia 25772-6457

Thomas J. Cullen, Esq.
Adam T. Sampson, Esq.
Goodell, DeVries, Leech & Dann
One South Street, 20th Floor
Baltimore, Maryland 21202

Lawrence E. Morhous, Esq.
Brewster, Morhous, Cameron, Mullins, Caruth, Moore, Kersey & Stafford
Post Office Box 529
Bluefield, West Virginia 24701

3. The objections and exceptions of plaintiff are noted and preserved.

ENTERED:

s/Tod J. Kaufman
Tod J. Kaufman
Judge

DATED: September 1, 2004

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1 DAY OF SEPTEMBER 2004.
s/Cathy s. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST
VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

v. CIVIL ACTION NO. 04-C-1174
(Judge Tod J. Kaufman)

CROWN EQUIPMENT CORP., a
foreign corporation; and JEFFERDS
CORP., d/b/a HOMESTEAD
MATERIALS HANDLING COMPANY,
a West Virginia corporation,

Defendants.

FILED
2004 NOV 24 PM 1:17

CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER

On the 1st day of September, 2004, and on the 12th day of November, 2004, came Jefferds Corp. by its counsel, Lawrence E. Morhous, and also came plaintiff by his counsel, Thomas W. Pettit, and presented oral argument on Jefferds Corp.'s motion to dismiss for lack of venue filed pursuant to Rule 12(b)(3), West Virginia Rules of Civil Procedure and West Virginia Code §56-1--1(c) and plaintiff's response to that motion coupled with his motion to amend his complaint.

The Court, having considered the argument of counsel on the motions, the applicable law, the allegations in plaintiff's complaint and proposed amended complaint, plaintiff's response to that motion, and the affidavit in support

of the dismissal motion filed by Jefferds Corp., does rule as follows:

Findings of Fact

1. That this civil action was filed after June 4, 2003.

2. That at all times relevant to this action, plaintiff is and has been a resident of the Commonwealth of Virginia.

3. That the injury giving rise to this action occurred in the Commonwealth of Virginia.

4. That even though Jefferds Corp. is a West Virginia corporation and some of its officers may reside in Kanawha County, plaintiff has failed to produce any fact to establish that "all or a substantial part of **(any) acts or omissions giving rise to (plaintiff's) claim**" (emphasis added) occurred within the State of West Virginia as mandated by Code §56-1--1(c).

5. That plaintiff did not file an affidavit with his complaint, his proposed amended complaint, or otherwise to demonstrate that his claims could not be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Jefferds Corp. as required in situations of this nature by Code §56-1--1(c).

Conclusions of Law

1. That venue for civil litigation in West Virginia is defined by statute.

2. That West Virginia Code §56-1-1(c) is applicable to all civil actions filed after June 4, 2003.

3. That since this action was filed after June 4, 2003, the applicable venue statute is West Virginia Code §56-1-1(c).

4. That plaintiff is a non-resident of the state of West Virginia as contemplated by West Virginia Code §56-1-1(c).

5. That West Virginia Code §56-1-1(c) does not differentiate as to whether a domestic or foreign entity is accused of injurious acts or omissions by a plaintiff but instead that statute requires that all or a substantial part of any such acts or omissions occur within the state of West Virginia and, more pertinent to this action, that such acts or omissions must have given rise to plaintiff's claims and thus neither the residency of the officers of Jefferds Corp. in West Virginia nor that company's operation of branch facilities in different states including Virginia and West Virginia as argued by plaintiff's counsel in opposition to Jefferds Corp.'s dismissal motion is not relevant to a determination of proper venue under that statute.

6. That because there is a complete absence of any proof that all or a substantial part of any acts or omissions giving rise to plaintiff's claims against Jefferds Corp. in this action occurred in the state of West Virginia and there being no credible proof presented by plaintiff to rebut any of the assertions set forth in the affidavit of J. David Sorrells submitted in support of Jefferds Corp.'s dismissal motion, there is no venue in this Court.

7. That plaintiff's allegations in his complaint and proposed amended complaint provide no factual or legal basis to disregard the deliberate choice by the West Virginia Legislature to exercise its right to define the venue for the Circuit Courts of this state as set forth in West Virginia Code §56-1-1(c) so as to protect not only those Courts but also the citizens of this State, including corporations such as Jefferds Corp. from claims of non-resident plaintiffs

8. That West Virginia Code §56-1-1(c) expressly provides that a dismissal in this circumstance must be without prejudice to the re-filing of a plaintiff's claims in a court in any other state or jurisdiction.

9. That both West Virginia Code §56-1-1(c) and Rule 12(b)(3) of the West Virginia Rules of Civil Procedure provide that dismissal of a civil action is the appropriate remedy when venue is not proper.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. All claims and causes of action asserted by plaintiff against Jefferds Corp. be, and they hereby are, **DISMISSED BUT WITHOUT PREJUDICE** to plaintiff re-filing his claims in a court in any other state or jurisdiction as contemplated by West Virginia Code §56-1-1(c).

2. The objections and exceptions of plaintiff to the rulings in this Order are hereby noted and preserved.

THE CLERK IS HEREBY INSTRUCTED TO MAIL AN ATTESTED COPY OF THIS ORDER TO EACH OF THE UNDERSIGNED ATTORNEYS IMMEDIATELY FOLLOWING THE ENTRY HEREOF.

ENTER: This 24th day of November, 2004.

s/T.J. Kaufman
Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24 DAY OF NOVEMBER 2004.
s/ Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

v. Civil Action No. **04-C-1174**
Tod Kaufman, Circuit Judge

CROWN EQUIPMENT CORP., a foreign corporation; and JEFFERDS CORP. D/B/A HOMESTEAD MATERIALS HANDLING COMPANY, a West Virginia corporation,

Defendants.

FILED
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CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

On the 12th day of November, 2004, came the parties, by their respective counsel, for hearing upon *Plaintiff's Motion to Reconsider.*

Whereupon the Court, having reviewed the written submissions of the parties, heard the oral arguments of counsel as to *Plaintiff's Motion to Reconsider*, which the Court concludes should be treated as a motion filed pursuant to W.Va. R. Civ. P. Rule 59(e). Having fully considered the same, the Court is of the opinion that Plaintiff's Motion to Reconsider should be **DENIED**, based upon the following findings and conclusions.

In resolving *Plaintiff's Motion to Reconsider*, the Court adopts all findings and conclusions set forth in its *Order*

entered herein on September 1, 2004, as if fully restated herein. The Court further finds and concludes as follows.

1. West Virginia Code § 56-1-1(c) was enacted by an Act of the West Virginia Legislature in 2003.

2. The legislative history of Senate Bill No. 213 (2003), which lead to enactment of W.Va. Code § 56-1-1(c)(2003), indicates that he purpose of the Bill was "to preserve West Virginia courts for West Virginians and for non-residents who are injured in this state," a compelling state interest.

3. In passing Senate Bill No. 213, the Legislature is presumed to have known and understood the pre-existing W.Va. Code § 56-1-1. It may be further presumed that the Legislature "meant what it said" in the text of W.Va. Code § 56-1-1(c)(2003). *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 585-86, 466 S.E.2d 424, 436-37 (1995).

4. Whereas paragraphs (a) and (b) of the pre-existing W.Va. Code § 56-1-1 reference terms such as "civil action" and "cause of action," W.Va. Code § 56-1-1(c)(2003) introduces a new, singular term, "claim"; i.e., ". . .unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." The Court therefore concludes that the Legislature intended that the term "claim," as used in W.Va. Code § 56-1-1(c), should have a different meaning than "cause of action" or "civil action."

5. The Court concludes that the use of the term "claim," when viewed in the context of the express purpose of W.Va. Code § 56-1-1(c), reflects the Legislature's intent that a non-resident of West Virginia who was not injured in West Virginia must establish venue as to each claim asserted, and consequently, as to each defendant against whom each claim is asserted. Had the Legislature's intent been otherwise, the Legislature would have expressly stated or used the same terminology found in W.Va. Code § 56-1-1, paragraphs (a) and (b).

6. The *West Virginia Rules of Civil Procedure* are not to be construed so as to extend or limit venue. W.Va. R. Civ. P. Rule 82. Consequently, the joinder rules set forth in W. Va. R. Civ. P. Rules 19 and 20 have no impact on the Court's determination of venue in this instance. Moreover, to the extent that the joinder rules may be intended to promote judicial economy and avoid piecemeal litigation, such goals would have been most appropriately pursued in this instance had the plaintiff prosecuted his claims in the courts of the Commonwealth of Virginia.

7. There is no conflict between W.Va. Code § 56-1-1(c) and W. Va. Code § 56-3-33(a)(4)-(5). The latter statute, which provides for "long-arm" jurisdiction, is applicable to injuries caused in West Virginia by conduct outside the State. In this instance, plaintiff's injuries occurred in Virginia, not West Virginia, and therefore, W.Va. Code § 56-3-33(a)(4)-(5) is inapplicable. Furthermore, jurisdiction and venue are distinct concepts, and each must be independently established by a plaintiff seeking to prosecute a claim against a defendant.

Therefore, for the reasons set forth above and in this Court's September 1, 2004 *Order* dismissing all claims against defendant Crown Equipment Corporation, without prejudice, it is accordingly **ORDERED** that *Plaintiff's Motion to Reconsider* shall be and is hereby **DENIED**.

There being no just reason for further delay in the disposition of plaintiff's claims against Crown, it is further **ORDERED** that the prior dismissal of claims against Crown, without prejudice, together with this denial of *Plaintiff's Motion to Reconsider*, shall constitute a **FINAL JUDGMENT** as between plaintiff and Crown, as contemplated by W.Va. R. Civ. P. Rule 54(e).

It is further **ORDERED** that the Clerk of Court shall provide a *teste* copy of this Order to counsel of record as follows:

Thomas W. Pettit, Esquire
THOMAS W. PETTIT, L.C.
P.O. Box 189
Barboursville, WV 25504

Michael J. Farrell, Esquire
Robert L. Hogan, Esquire
FARRELL, FARRELL & FARRELL, L.C.
P.O. Box 6457
Huntington, WV 25772-6457

Thomas J. Cullen, Esquire
Adam T. Sampson, Esquire
GOODELL, DeVRIES, LEECH & DANN, LLP
One South Street, 20th Floor
Baltimore, MD 21202

Lawrence E. Morhous, Esquire
BREWSTER, MORHOUS, CAMERON MULLINS,
CARUTH, MOORE, KERSEY & STAFFORD, PLLC
P.O. Box 529
Bluefield, WV 24701

The objections and exceptions of plaintiff are noted and preserved.

ENTER: 11/29/04

s/Tod J. Kaufman
Tod J. Kaufman, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY

FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30th DAY OF NOVEMBER 2004.
s/ Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared for entry by:

s/Robert L. Hogan
Michael J. Farrell, WVSB # 1168
Robert L. Hogan, WVSB # 5979
FARRELL, FARRELL & FARRELL, L.C.
P.O. Box 6457
Huntington, WV 25772-6457
Telephone: (304) 522-9100
Facsimile: (304) 522-9162

– *And* –

Thomas J. Cullen, *admitted pro hac vice*
Adam T. Sampson, *admitted pro hac vice*
GOODELL, DeVRIES, LEECH & DANN LLP
One South Street, 20th Floor
Baltimore, MD 21202
Telephone: (410) 783-4000
Facsimile: (410) 783-4040
Attorneys for Crown Equipment Corporation

ANNOTATED CODE OF WEST VIRGINIA
CHAPTER 56. PLEADING AND
PRACTICE ARTICLE 1. VENUE

§56-1-1- **Venue generally**

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;

(2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management;

(3) If it be to recover land or subject it to a debt, where the land or any part may be;

(4) If it be against one or more nonresidents of the state, where any one of them may be found and served with process or may have estate or debts due him or them;

(5) If it be to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

(6) If it be on behalf of the state in the name of the attorney general or otherwise, where the seat of government is; or

(7) If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit.

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

(c) Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this

state: *Provided,* That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident brining such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

In a civil action where more than on plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refilling in a court in any other state or jurisdiction.